
IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GRIFFITHS DAIRY, INC., a corporation,
Appellant

v.

CLARK SQUIRE, Collector of Internal Revenue,
Appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF FOR THE APPELLEE

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,
S. DEE HANSON,

*Special Assistants to the
Attorney General.*

J. CHARLES DENNIS,
United States Attorney.

HARRY SAGER,
Assistant United States Attorney.

THOMAS R. WINTER,
*Special Assistant to the Chief Counsel,
Bureau of Internal Revenue.*

1017 UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON

FILED
JUL 21 1943

PAUL P. O'BRIEN,

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GRIFFITHS DAIRY, INC., a corporation,
Appellant

v.

CLARK SQUIRE, Collector of Internal Revenue,
Appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF FOR THE APPELLEE

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,
S. DEE HANSON,

*Special Assistants to the
Attorney General.*

J. CHARLES DENNIS,
United States Attorney.

HARRY SAGER,
Assistant United States Attorney.

THOMAS R. WINTER,
*Special Assistant to the Chief Counsel,
Bureau of Internal Revenue.*

1017 UNITED STATES COURT HOUSE
SEATTLE, WASHINGTON

INDEX

	PAGE
OPINION BELOW	1
JURISDICTION	1
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT	4
SUMMARY OF ARGUMENT	10
ARGUMENT:	
I. This Court is without jurisdiction in this proceeding except to the extent of the taxpayer's claim for the refund of \$20 documentary stamp taxes	13
II. In any event, the stamp tax assessed on the original issue of 50,000 shares was proper	18
III. Griffiths' donation of 22,000 shares as treasury stock to the taxpayer constituted a taxable transfer of "rights * * * to receive such shares" within the meaning of Section 1802(b), Internal Revenue Code, as amended	21
IV. The taxpayer's sales and transfer of 1,600 shares of its treasury stock to Clothier and Sell constituted taxable transfers	25
CONCLUSION	26
APPENDIX	28

CITATIONS

CASES:

	PAGE
<i>American Gas Machine Co. v. Willcuts</i> , 87 F. (2d) 924	24
<i>Balto. & Ohio R.R. v. United States</i> , 260 U.S. 565	17
<i>Canal Bank v. Hudson</i> , 111 U.S. 66.....	20
<i>Commissioner v. Burdette</i> , 69 F. (2d) 410....	20
<i>Commissioner v. Crescent Leather Co.</i> , 40 F. (2d) 833	20
<i>Commissioner v. Gerard</i> , 75 F. (2d) 542	20
<i>Commissioner v. Neaves</i> , 81 F. (2d) 947.....	20
<i>Dalton Foundries v. United States</i> , 56 F. (2d) 483	18
<i>Electric Storage Battery Co. v. McCaughn</i> , 54 F. (2d) 814	18
<i>Founders General Co. v. Hoey</i> , 300 U.S. 268....	24
<i>Hearn, James A., & Son v. United States</i> , 8 F. Supp. 698, certiorari denied, 294 U.S. 722..	16
<i>Israelite House of David v. Holden</i> , 14 F. (2d) 701	15
<i>Jewett & Co. v. United States</i> , 19 F. Supp. 363..	16
<i>Kemper Military School v. Crutchley</i> , 274 Fed. 125	15
<i>Maloney v. Portland Associates</i> , 109 F. (2d) 124	24
<i>Old Mission P. Cement Co. v. Commissioner</i> , 69 F. (2d) 676	20
<i>Osborn v. United States</i> , 54 F. (2d) 824.....	18
<i>Prey Bros. Live Stock Commission Co. v. Commissioner</i> , 36 F. (2d) 326.....	20, 21
<i>Raybestos-Manhattan Co. v. United States</i> , 296 U.S. 60	24
<i>Richards v. Robin</i> , 175 App. Div. 296, affirmed, 225 N.Y. 719	22, 23
<i>Richardson v. Shaw</i> , 209 U.S. 365	22

CITATIONS (Continued)

	PAGE
<i>Rock Island &c R.R. v. United States</i> , 254	
U.S. 141	13, 15
<i>Standard Oil Co. of California v. United States</i> ,	
90 F. (2d) 571	24
<i>Tidwell v. Anderson</i> , 72 F. (2d) 684.....	20
<i>United States v. Brown Fence & Wire Co.</i> , 9 F.	
Supp. 1008, affirmed, 88 F. (2d) 1005....	24
<i>United States v. Revere Copper & Brass</i> , 100	
F. (2d) 391	24
<i>United States v. Vortex Cup Co.</i> , 84 F. (2d) 925	24
<i>Woolworth, F. W., Co. v. United States</i> , 15 F.	
Supp. 679, reversed, 91 F. (2d) 973, certio-	
rari denied, 302 U.S. 768	18

STATUTES:

Internal Revenue Code:

Sec. 1802, as amended (U.S.C. 1940 ed., Title	
26, Sec. 1802) .2, 3, 9, 19, 21, 24, 25, 26, 28, 29	
Sec. 3770, as amended (U.S.C. 1940 ed., Title	
26, Sec. 3770)	15
Sec. 3772 (U.S.C. 1940 ed., Title 26, Sec.	
3772)	2, 3, 13, 16, 18, 29, 30
Revised Statutes, Sec. 3226, as amended.....	16

MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 52.....	20
--	----

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GRIFFITHS DAIRY, INC., a corporation,
Appellant

v.

CLARK SQUIRE, Collector of Internal Revenue,
Appellee

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF FOR THE APPELLEE

OPINION BELOW

The only opinion in this case is that included in the District Court's Findings of Fact and Conclusions of Law (R. 12-18), which is not reported.

JURISDICTION

This is an appeal taken by Griffiths Dairy, Inc.,

from the judgment entered March 17, 1943, by the District Court in favor of the Collector of Internal Revenue, dismissing the taxpayer's complaint with costs to the Collector. (R. 19-20.) The judgment was entered in an action, tried without a jury (R. 12), filed by the taxpayer on December 23, 1941, for the abatement of documentary or stamp taxes assessed against and partially paid by the taxpayer in 1941 in the sum of \$1,235, plus penalties and interest of \$170.15, and also for the refund of like taxes in the amount of \$20¹ (R. 2-11). The action arose under the provisions of Section 1802(a) and (b) of the Internal Revenue Code, as amended by Section 1 of the Revenue Act of 1939, and jurisdiction was vested in the District Court under the provisions of Section 24, Fifth, of the Judicial Code, as amended, and Section 3772(a) (1) and (2) of the Internal Revenue Code

¹Stamp taxes were assessed against the taxpayer in the total sum of \$1,235 in 1941, and the taxpayer paid \$600 thereof in installments during that year. (R. 6, 10-11, 15.) The taxpayer, however, filed claim for the abatement of \$1,235, plus penalty and interest of \$170.15, which was rejected by the Commissioner of Internal Revenue on June 17, 1941; and also a claim for the refund of the alleged overpayment of only \$20, upon which no separate action was taken by the Commissioner before or after commencement of this suit on December 23, 1941. (R. 11, 16, 17.) Consequently there can be involved in this proceeding only the latter amount covered by the claim for refund, a matter dealt with hereinafter.

(to the extent of the amount of \$20 specified in the claim for refund). The case is brought to this Court by notice of appeal filed April 9, 1943. (R. 21.) Jurisdiction of this Court is invoked by virtue of the provisions of Section 128(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether, under the provisions of Section 3772(a) (1) and (2), Internal Revenue Code, this Court has jurisdiction in this proceeding except to the extent of the taxpayer's claim for the refund of \$20 documentary or stamp taxes allegedly overpaid in 1941.

2. Whether the documentary or stamp tax assessed against the taxpayer under the provisions of Section 1802(a), Internal Revenue Code, as amended, on the original issue of 50,000 shares of its stock for assets conveyed to it by its incorporators in 1940, was proper.

3. Whether the donation by Austin E. Griffiths, Jr., the taxpayer's principal stockholder, of 22,000 of his original subscription for 39,000 shares of the taxpayer's stock, to the taxpayer as treasury stock, constituted a taxable transfer of rights to receive such shares within the meaning of Section

1802(b), Internal Revenue Code, as amended.

4. Whether the taxpayer's sale and transfer of 1,000 and 600 shares of its treasury stock to M. Clothier and Donald Sell, respectively, constituted taxable transfers within the meaning of Section 1802(b), Internal Revenue Code, as amended.

STATUTES INVOLVED

The pertinent statutes are set forth in the Appendix, *infra*.

STATEMENT

The pertinent facts were found by the District Court substantially as follows (R. 12-17):

Griffiths Dairy, Inc. (hereafter called the taxpayer), was organized under the laws of the State of Washington on July 5, 1940, in the following manner: Austin E. Griffiths, Jr. (hereafter called Griffiths), and his wife were for many years prior thereto the owners, as a Washington community, of a dairy business in and about Seattle, Washington, known as the Griffiths Dairy. It was a going business and had assets comprising 11 milk routes, trucks, cans, furniture and other dairy equipment of an estimated value of \$60,685. The business at the time of incorporation owed debts on account of the operation of the

business in the amount of \$34,780. Griffiths was advised by officers of the Reconstruction Finance Corporation, from which he expected to obtain a loan, to form a corporation by turning over to it all of the assets of the dairy business. It was decided therefore to form a corporation to take over the dairy business for the above purpose as it was thought that the business might be carried on more advantageously if additional capital was received, and particularly if prior creditors of the business would take stock in full or part payment of their claims. It was also thought that employees would become more interested in the taxpayer's business if they became part owners by taking stock therein. No persons, however, subsequent to the incorporation, bought shares of stock in the corporation, except as stated hereinafter. There was transferred to M. Clothier 1,000 shares of treasury stock in part payment of a prior debt, and 600 shares to Donald Sell, who was to be employed by the taxpayer, and if he ceased to be so employed then his shares were to be taken back by the taxpayer. (R. 12, 13-14.)

The taxpayer corporation was incorporated on July 5, 1940, with an authorized capital of \$50,000, represented by 14,000 shares of no par value stock, classified as preferred stock, and 36,000 shares of no

par value stock, classified as common stock. Griffiths, his wife, and Byron T. Parry were the sole incorporators and the sole and first directors and officers thereof. Parry's stock was in payment of a prior debt or bonus due him. Pursuant to an offer made to the taxpayer's board of directors by Griffiths on July 9, 1940, and accepted by the taxpayer in its corporate minutes, assets having an estimated value of \$60,685 were conveyed to the taxpayer by Griffiths in payment of the entire 50,000 shares of stock. (R. 14.)

The stock was subscribed for as follows: Austin E. Griffiths, Jr., subscribed for 39,000 shares, Ragna S. Griffiths, his wife, subscribed for 9,000 shares, and Byron T. Parry subscribed for 2,000 shares, which stock had an actual value of \$25,000. However, certificates covering only 28,000 of the 50,000 shares subscribed for were issued to Griffiths, his wife, and Parry, and the remainder, 14,000 shares of preferred and 8,000 shares of common, was donated to the taxpayer by Griffiths to be and remain in the taxpayer's treasury as and for its own property, fully paid and nonassessable, to be later sold and delivered for the sole use and benefit of the corporation and for such sum or sums as the board of directors may from time to time decide and order. Subsequently, certificates

for 1,000 shares and 600 shares of the treasury stock so donated were sold and transferred from the treasury of the taxpayer to M. Clothier and Donald Sell, respectively, as previously stated. (R. 14-15.)

Upon investigation by revenue officers, it was ascertained that no documentary stamps had been affixed and cancelled with respect to either the original subscription of 50,000 shares, the donation of 22,000 shares to the treasury, or the subsequent sale and transfer of 1,600 shares to Clothier and Sell. Accordingly, assessments of the following taxes were made by the Commissioner of Internal Revenue on January 29, 1941 (R. 15):

On original subscription issue of 50,000 shares—		
Austin E. Griffiths, Jr.		
.....	39,000 shares	\$42.90
Ragna S. Griffiths		
.....	9,000 shares	9.90
Byron T. Parry.	2,000 shares	2.20
		<hr/>
		\$ 55.00
Donation or transfer of		
22,000 shares to treasury.....		1100.00
Transfer of 1,000 shares treasury		
stock to M. Clothier		50.00
Transfer of 600 shares treasury		
stock to Donald Sell		30.00
		<hr/>
Total		\$1235.00

On October 17, 1940, before the taxes were assessed, a sworn protest was filed on behalf of the taxpayer and its incorporators, and on April 5, 1941, subsequent to the assessment, the taxpayer filed a claim (Form 843) dated March 24, 1941, requesting abatement of the above-mentioned assessment of \$1,235 plus penalty and interest of \$170.15. On or about the same date, that is, April 5, 1941, the taxpayer filed an instrument captioned "Petition for Refund", addressed to the Commissioner of Internal Revenue, dated March 28, 1941, the last two paragraphs of which read as follows (R. 16):

6. Petitioner respectfully represents that a reasonable and lawful Stamp Tax upon said stock taxed by your office, instead of being the sum of \$1,305.00, was and is not to exceed the sum of \$100.00.

Wherefore, petitioner respectfully prays a return of the sum of \$20.00, being over-payment in such amount.

On March 24, 1941, the taxpayer filed an agreement, and also its protest against the amount of taxes in question, with the Collector of Internal Revenue wherein it agreed to make monthly payments of \$120 on the fifth day of each month until the total amount of the tax and interest theretofore assessed shall have been paid. (R. 16.)

Subsequent to the date of the above agreement

but prior to the filing of the claim for abatement (Form 843) and the petition for refund, the taxpayer had paid to the Collector of Internal Revenue on March 24, 1941, the sum of \$120 only. However, prior to the commencement of this action on December 23, 1941, the taxpayer made the following payments to the Collector: \$120 on May 8, 1941; \$120 on June 10, 1941; and \$240 on October 8, 1941. The claim for abatement (Form 843) was considered by the Commissioner of Internal Revenue and was rejected by letter to the taxpayer on June 17, 1941. No separate action was taken by the Commissioner with respect to the "Petition for Refund", which was filed on April 5, 1941, and this action was begun on December 23, 1941. (R. 17.)

Upon the basis of the foregoing facts, the District Court concluded as a matter of law and held that the taxpayer was liable under Section 1802(a), Internal Revenue Code, for a stamp tax of only \$37.50 instead of \$55 as assessed by the Commissioner on the original issue of 50,000 shares of its stock² upon its incorporation in 1940; but that it was liable under Section 1802(b), Internal Revenue Code, for documentary or stamp taxes in the sums of \$1,100 and \$80 assessed on the transfer of Griffiths' right to re-

²The Collector took no appeal from this decision.

ceive the 22,000 shares of stock which he donated to the taxpayer's treasury, and on the transfer of 1,600 shares of the taxpayer's treasury stock to Clothier and Sell, respectively. (R. 17-18.) The court below thereupon entered judgment in favor of the Collector accordingly (R. 19-20), from which the taxpayer appealed to this Court (R. 21).

SUMMARY OF ARGUMENT

1. The taxpayer's claims in abatement and for refund of documentary stamp taxes in the respective amounts of \$1,235 and \$20, rejected by the Commissioner, could give jurisdiction in this proceeding only to the extent of the amount specified in the claim for refund. There is no provision in law for abatement claims to constitute the basis for a suit to recover internal revenue taxes, penalties or other disputed amounts. Under the pertinent statute, a suit for the recovery of such taxes, penalties or other amounts claimed to have been erroneously or illegally assessed or collected may be maintained only upon the filing of a claim for refund with the Commissioner of Internal Revenue, according to the provisions of the law and regulations in that regard, after rejection of the claim by that official or six months after filing if no action has been taken thereon in the meantime. Since the taxpayer's claim for refund failed to make a claim also

for "such greater amount as is legally refundable", its maximum recovery is limited to the amount specified in the claim. The major portion of the amount of refund claimed was allowed by the District Court, and the balance is nonrefundable because the taxpayer concedes a tax liability greater than the amount claimed as a refund.

2. Alternatively, the taxpayer is liable in any event under the taxing statute for stamp taxes on the several transactions herein involving transfers of stock and of rights to receive stock, as assessed by the Commissioner and to the extent found by the District Court. Thus, the taxpayer's original issue of 50,000 shares of no par value stock to its incorporators in exchange for their assets turned in therefor upon incorporation in 1940 clearly constituted taxable transfers on the basis of the valuation of the stock found by the District Court and at the rates of taxation specified in the taxing act applicable to transfers of no par value shares of a value of less than \$20 a share. The taxpayer's contention that the District Court erred in its finding of value of the stock in question is untenable for the reason that the court's findings must be presumed to be supported by the evidence when, as herein, the evidence is not brought up on appeal.

3. The donation by Griffiths, the taxpayer's principal stockholder, of 22,000 shares of no par value stock to the taxpayer as treasury stock constituted a taxable transfer of rights to receive such shares within the meaning of the taxing act. The taxpayer admits that Griffiths gave that number of shares, out of the block of 39,000 shares he originally subscribed for, back to the taxpayer to be held as treasury stock for sale to others, as the court below found. The taxing statute imposes stamp taxes on all sales or transfers of legal title to shares or certificates, whether shown by the corporate books or any delivery pursuant to an agreement or other evidence of transfer, where such shares are without par or face value but of a value less than \$20 a share, as herein. It is immaterial whether the transfer of the rights to receive was effected by gift or otherwise, the fact of transfer having given rise to the incidence of the tax. Since the transfer falls squarely within the specific terms of the taxing act, the Commissioner's assessment of the stamp tax as affirmed by the District Court is correct.

4. The taxpayer's sale and transfer of 1,600 shares of its treasury stock, donated to it by Griffiths, to its creditor Clothier in partial discharge of a debt, and to its employee Sell to retain his services,

respectively, as found by the court below and admitted by the taxpayer, plainly constituted taxable transfers of such shares within the meaning of the taxing statute. Consequently, the stamp taxes assessed on those transactions by the Commissioner and affirmed by the court below must be allowed to stand as correct.

ARGUMENT

I

THIS COURT IS WITHOUT JURISDICTION IN THIS PROCEEDING EXCEPT TO THE EXTENT OF THE TAXPAYER'S CLAIM FOR THE REFUND OF \$20 DOCUMENTARY STAMP TAXES.

Under the facts herein this action was inopportune brought by the taxpayer on the basis of the abatement claim rejected by the Commissioner. Such actions, however, may properly be brought under the statute only on the basis of claims for refund or credit³ rejected by the Commissioner or not acted upon by him within six months after filing. Section 3772(a) (1) and (2), Internal Revenue Code (Appendix, *infra*). In this connection, the pertinent facts

³Since claims for credit may not be filed by taxpayers, a claim for refund is the only claim which may be filed as a basis for suit. *Rock Island &c. R.R. v. United States*, 254, U.S. 141.

show that because of the taxpayer's failure to affix and cancel appropriate documentary stamps in respect to its original issue of 50,000 shares of no par value stock, and the subsequent transfers of 23,600 shares of its treasury stock (R. 406, 13-14), the Commissioner of Internal Revenue assessed on January 29, 1941, stamp taxes on such transactions in the principal amount of \$1,235 (R. 6, 10, 15). The taxpayer, pursuant to an agreement entered into on March 24, 1941, with the Collector of Internal Revenue (R. 16), made installment payments in connection with such assessment on March 26, May 8, June 10, and October 8, 1941, in the amounts of \$120, \$120, \$120, and \$240, respectively (R. 8, 10, 17). The taxpayer on April 5, 1941, and before the second tax installment was paid on May 8, 1941, filed a claim in abatement for \$1,235, plus penalty and interest of \$170.15, together with a claim for the refund of \$20 of the taxes in question, both of which claims⁴ were rejected by the Commissioner on June 17, 1941. (R. 8, 11, 16-17.) After filing the claims and prior to the commencement of this action on December 23, 1941, the tax-

⁴The taxpayer's claim in abatement (Form 843), to which it had attached a document entitled "Petition for Refund" requesting the "return of the sum of \$20.00, being overpayment in such amount", was considered in its entirety by the Commissioner to be a claim in abatement and was rejected by him ac-

payer made additional payments aggregating \$480. (R. 10, 17.)

Under these facts, therefore, the taxpayer had actually paid only \$120 of the taxes in question at the time it filed its claims in abatement and for refund. The tax payments made after filing the claims, whether made before or after institution of suit, could not, of course, be involved in this proceeding since a claim for refund must be filed after payment of the tax. *Israelite House of David v. Holden*, 14 F. (2d) 701 (W.D. Mich.); *Rock Island &c R.R. v. United States*, 254 U.S. 141⁵. Moreover, while the filing of the abatement claim could have been the basis for an *abatement* of the taxes in question by the Commissioner or Collector (Section 3770, Internal Revenue Code, as amended by Section 508, Second Revenue Act of 1940, c. 757, 54 Stat. 974), it could not, upon rejection by the Commissioner or otherwise, have constituted the basis for a suit for the recovery or *refund* of any internal revenue tax, penalty, or other sum claimed to have been erroneously or illegally assessed

cordingly on June 17, 1941. (R. 11, 16, 17.) No separate action was taken by the Commissioner with respect to the claim for refund of \$20. (R. 17.)

⁵Cf. *Kemper Military School v. Crutchley*, 274 Fed. 125 (W.D. Mo.) (holding a deduction can not be claimed for the first time in court).

or collected. The statute provides that such suit may be maintained only upon the filing of a claim for refund with the Commissioner, according to the provisions of the law and regulations in that regard. Section 3772(a) (1) and (2), Internal Revenue Code⁶. A claim for refund therefore is the only claim which may be filed as a basis for suit, and this rule applies even though a prior claim for abatement was rejected, as herein. *Rock Island &c. R.R. v. United States*, *supra*. In *Jewett & Co. v. United States*, 19 F. Supp. 363 (W.D. N.Y.), the complaint of the taxpayer was dismissed because no refund claim had been filed. In *James A. Hearn & Son v. United States*, 8 F. Supp. 698 (C.Cls.), certiorari denied, 294 U.S. 722, it was held that a refund claim was a condition precedent to a suit based on Sections 607 and 609 of the Revenue Act of 1928, and that a mere statement in the petition that a claim was "duly filed" was insufficient.

Accordingly, the maximum amount which in any event can be involved in this proceeding is \$20, claimed by the taxpayer in its somewhat informal

⁶Section 3772, Internal Revenue Code, is a re-enactment of Section 3226, Revised Statutes, as amended by Section 1103, Revenue Act of 1932, c. 209, 47 Stat. 169, and by Section 807 of the Revenue Act of 1936, c. 690, 49 Stat. 1648.

“Petition for Refund”.⁷ (R. 11, 16.) Inasmuch as the court below held that the taxpayer was liable for stamp taxes of only \$37.50 instead of the amount of \$55 assessed by the Commissioner on the original issue of 50,000 shares, and the Government took no appeal therefrom,⁸ the taxpayer’s claim for refund has already been allowed in the sum of \$17.50⁹. Therefore, there remains only \$2.50 still involved in this proceeding. Since the taxpayer concedes liability for a “lawful Stamp Tax * * * not to exceed the sum of \$100.00” originally paid (R. 16, Br. 11), however, there is no remaining basis for further consideration or allowance of its claim for refund, and consequently the judgment of the court below is correct.

Under a claim for refund which specifies a cer-

⁷There may be doubt as to the effectiveness or validity of this claim since an informal claim is not sufficient. *Balto. & Ohio R.R. v. United States*, 260 U.S. 565.

⁸See Footnote 2, *supra*.

⁹The Treasury Department was requested by the Attorney General in a letter dated April 14, 1943, to issue a certificate of overassessment for this amount in favor of the taxpayer so that the total assessment of stamp tax liability against the taxpayer will be \$1,217.50, in harmony with the decision of the court below (R. 17-18), instead of \$1,235 as originally assessed by the Commissioner (R. 15).

tain amount "or such greater amount as is legally refundable", the taxpayer may sue for a larger amount than is set forth in the claim provided the entire suit proceeds on the ground set forth in the claim. *Electric Storage Battery Co. v. McCaughn*, 54 F. (2d) 814 (E.D. Pa.); to the same effect see *Osborn v. United States*, 54 F. (2d) 824 (C.Cls.); *Dalton Foundries v. United States*, 56 F. (2d) 483 (C.Cls.); *F. W. Woolworth Co. v. United States*, 15 F. Supp. 679 (S.D. N.Y.), reversed, but not on this point, 91 F. (2d) 973 (C.C.A. 2d), certiorari denied, 302 U.S. 768. Since the taxpayer's claim for refund specified only \$20, however, and made no claim for any greater sum which might be legally refundable, it is clear that any recovery herein must be limited to that amount. Section 3772, Internal Revenue Code.

In the event the foregoing should be considered insufficient, the following is submitted alternatively.

II

IN ANY EVENT, THE STAMP TAX ASSESSED
ON THE ORIGINAL ISSUE OF 50,000 SHARES
WAS PROPER

Upon the taxpayer's incorporation on July 5, 1940, Griffiths, his wife, and Parry subscribed for 50,000 shares of the original issue of stock which the court below found "had an actual value of

\$25,000". (R. 14.) Since the taxpayer failed to affix thereto and cancel the proper documentary stamps, the Commissioner assessed stamp taxes in the sum of \$55 on the transaction (R. 15) but the court below reduced the assessment to \$37.50¹⁰ (R. 17-18).

The taxing statute imposes a stamp tax on each original issue of certificates of stock of a value of less than \$100 per share at the rate of three cents on each \$20 of actual value or fraction thereof of such certificates, or of the shares where no certificates were issued. Section 1802(a), Internal Revenue Code, as amended (Appendix, *infra*). It is immaterial, of course, that certificates for the entire 50,000 shares were not issued by the taxpayer (R. 14), since the statute taxes a transfer of such stock "or of the shares where no certificates were issued". It follows, therefore, that the amount of the stamp tax liability determined by the District Court was correct.

The taxpayer contends substantially that the District Court's finding of a value of \$25,000 for the

¹⁰The District Court's determination of a stamp tax liability of only \$37.50 on the original issue of the taxpayer's 50,000 shares was based on a valuation thereof of \$25,000 which, under the taxing statute, was subject to a stamp tax liability at the rate of three cents on each \$20 of actual value thereof (\$25,000 divided by \$20 equals \$1,250, times three cents equals \$37.50).

stock in question is not supported by the evidence and fails to sustain its conclusion as to the tax liability (Br. 8, 11-14); and also that the valuation found disregarded the provisions of the statute which requires the "actual value" of the stock to be found (Br. 12).

As the taxpayer states (Br. 8), however, the evidence was omitted from the record on appeal. It is settled that the trial court's findings are presumed to be supported by the evidence when the evidence is not brought up. *Canal Bank v. Hudson*, 111 U.S. 66, 81; *Commissioner v. Crescent Leather Co.*, 40 F. (2d) 833 (C.C.A. 1st). Consequently, there being no evidence to compel a contrary conclusion, the District Court's findings and conclusion in respect to the value of the stock in question must, in the absence of the supporting evidence, be accepted as correct. They may therefore not properly be set aside (Rule 52(a), Federal Rules of Civil Procedure), as this Court and other courts have frequently held. *Commissioner v. Neaves*, 81 F. (2d) 947, 949 (C.C.A. 9th); *Commissioner v. Gerard*, 75 F. (2d) 542, 544 (C.C.A. 9th); *Old Mission P. Cement Co. v. Commissioner*, 69 F. (2d) 676, 679 (C.C.A. 9th); *Commissioner v. Burdette*, 69 F. (2d) 410, 411 (C.C.A. 9th); *Tidwell v. Anderson*, 72 F. (2d) 684, 687 (C.C.A. 2d); *Prey*

Bros. Live Stock Commission Co. v. Commissioner,
36 F. (2d) 326, 327 (C.C.A. 10th).

III

GRIFFITHS' DONATION OF 22,000 SHARES AS TREASURY STOCK TO THE TAXPAYER CONSTITUTED A TAXABLE TRANSFER OF "RIGHTS * * * TO RECEIVE SUCH SHARES" WITHIN THE MEANING OF SECTION 1802(b), INTERNAL REVENUE CODE, AS AMENDED

The District Court found that under Griffiths' offer of July 9, 1940, accepted by the taxpayer, the 22,000 of his 39,000 shares originally subscribed for were donated by him to the taxpayer as its own property to remain as fully paid and nonassessable treasury stock for later sale to others. (R. 14-15) Accordingly, the court upheld the Commissioner's determination (R. 15) of a stamp tax liability assessed in the sum of \$1,100 on the transaction as the proper amount due under Section 1802(b), Internal Revenue Code, as amended, on the transfer of the right to receive such number of shares donated by Griffiths to the taxpayer's treasury (R. 18, par. III).

The taxpayer contends substantially that this action was erroneous in that there is no stamp tax upon such a naked donation or transfer of rights to receive (Br. 11); that the 22,000 shares of stock in ques-

tion were not issued to Griffiths although he "could have taken it with no added expense"; and that since the "22,000 shares were given by Griffiths to the company without nominee or direction for its disposal", the transaction was not taxable (Br. 12-13).

The taxpayer admits, however, that "Griffiths donated appellant 22,000 of those [39,000 shares] he subscribed for" (Br. 6), and that the 22,000 shares were given by Griffiths to the taxpayer as treasury stock (Br. 12). It also concedes that it subsequently issued certain portions of the treasury stock to others (Br. 13), as the court below found (R. 14-15). It necessarily follows, therefore, that Griffiths could not have given those shares back to the taxpayer as treasury stock if he had not first received title thereto upon his original subscription for 39,000 shares. We have already shown under point II, *supra*, that Griffiths in fact received the latter number of shares as an original subscription from the taxpayer, even though no certificates were issued therefor, and that the transaction constituted a taxable transfer. He therefore became the initial owner of the stock at least for an instant, whether or not the transfer was recorded on the taxpayer's books or certificates were issued therefor. *Richardson v. Shaw*, 209 U.S. 365; *Richards v. Robin*, 175 App. Div. 296, 162 N.Y. Supp. 12,

affirmed, 225 N.Y. 719. There could be no clearer case of a statutory taxable transfer of "rights * * * to receive such shares", therefore, than when the "22,000 shares were given by Griffiths to the company" as treasury stock, as the taxpayer states (Br. 12), and as the court below found (R. 14-15). It is clearly immaterial whether the transfer was effected by gift or otherwise; the fact of transfer gave rise to the incidence of the tax.

Although the taxpayer objects to the value of the stock as found by the court below and claims it "would be nominal" and "should not exceed \$100" in toto (Br. 11), the fact remains that the tax assessed by the Commissioner constitutes the lowest possible rate imposed by the taxing statute on no par value stock of a value less than \$20 a share, as herein. Therefore, regardless of any claimed unproved lesser value of the stock in question, the tax liability on the transfer could not be less in any event. Moreover, in the absence of any evidence in the record to show a value different from that found by the court below, the court's finding of value must stand, as heretofore shown.

The statute imposes a tax "on all sales * * * or transfers of legal title to any * * * shares or certificates * * * or to rights * * * to receive such shares or

certificates, whether made upon or shown by the books of the corporation * * *, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale * * * where such shares or certificates are without par or face value", at the minimum rate of five cents a share. Section 1802(b), Internal Revenue Code. Since the transaction in question falls squarely within the terms of the taxing statute, therefore, the District Court's holding that the taxpayer is liable for stamp taxes in the sum of \$1,100 assessed under the provisions of that statute on the transfer of the right to receive 22,000 shares is correct and should be affirmed by this Court. *Raybestos-Manhattan Co. v. United States*, 296 U.S. 60; *Founders General Co. v. Hoey*, 300 U.S. 268; *Maloney v. Portland Associates*, 109 F. (2d) 124, 127 (C.C.A. 9th); *Standard Oil Co. of California v. United States*, 90 F. (2d) 571 (C.C.A. 9th); *United States v. Revere Copper & Brass*, 100 F. (2d) 391 (C.C.A. 2d); *United States v. Brown Fence & Wire Co.*, 9 F. Supp. 1008 (N.D. Ohio), affirmed *per curiam*, on the authority of *Founders General Co. v. Hoey*, *supra*, 88 F. (2d) 1005 (C.C.A. 6th); *United States v. Vortex Cup Co.*, 84 F. (2d) 925 (C.C.A. 7th); *American Gas Machine Co. v. Willcuts*, 87 F. (2d) 924 (C.C.A. 8th).

IV

THE TAXPAYER'S SALES AND TRANSFER OF
1,600 SHARES OF ITS TREASURY STOCK TO
CLOTHIER AND SELL CONSTITUTED TAX-
ABLE TRANSFERS

The District Court found that the taxpayer, from the 22,000 shares of its stock donated to it as treasury stock by Griffiths, sold and transferred 1,000 and 600 shares thereof to M. Clothier in part payment of a prior debt, and to Donald Sell in consideration for his remaining in its employ, respectively. (R. 13-14, 15.) Accordingly, the court held that the taxpayer is liable under Section 1802(b), Internal Revenue Code, as amended, for stamp tax liability in the sum of \$80, as assessed by the Commissioner (R. 15), on the transfer of such shares (R. 18, par IV).

The taxpayer contends with respect to these transfers that the shares had only a nominal value and therefore should not have been taxed on the basis assessed by the Commissioner and found by the court below. (Br. 13.) The value found by the District Court, however, must stand in the absence of the sup-

¹¹The cases relied upon by the taxpayer (Br. 22-24) are distinguishable on their facts and have no direct application to the present case. In this connection, the taxpayer admits (Br. 19) that it "has been unable to find a case in point on all aspects of this one."

porting evidence, as heretofore shown.

Moreover, since the taxpayer admits that Griffiths gave 22,000 shares back to it as treasury stock to be held as its own property for subsequent sale to others, as the court below found, and also that "later, the company issued Class C shares to creditor Clothier and worker Sell and their 1600 shares were taxed \$80" (Br. 13), there can be no question that the taxpayer thus transferred that number of shares from its treasury to them. Upon these admissions of the sale and transfer of the two blocks of treasury stock in question, therefore, it is apparent that the court below had no alternative than to affirm the Commissioner's action, and consequently to hold that the taxpayer is liable for the stamp taxes imposed upon the transfers thereof under the specific terms of Section 1802(b), Internal Revenue Code, as amended.

CONCLUSION

It is submitted that this Court is without jurisdiction in this proceeding except to the extent of the taxpayer's claim for refund of \$20, and therefore, the judgment of the District Court should be affirmed.

Alternatively, the District Court correctly held, in accordance with law and the authorities, that the taxpayer is liable for stamp taxes in the amounts of

\$37.50 on the original issue of 50,000 shares of its stock, \$1,100 on the transfer of the right to receive 22,000 shares donated by Griffiths to it as treasury stock, and \$80 on the sale and transfer of 1,600 shares to Clothier and Sell, respectively, as shown under Points II, III, and IV, *supra*. The judgment of the court below should therefore be affirmed.

Respectfully submitted,

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
A. F. PRESCOTT,
S. DEE HANSON,
*Special Assistants to the
Attorney General.*

J. CHARLES DENNIS,
United States Attorney.

HARRY SAGER,
Assistant United States Attorney.

THOMAS R. WINTER,
*Special Assistant to the Chief Counsel,
Bureau of Internal Revenue.*

APPENDIX

Internal Revenue Code:

SEC. 1802. [as amended by Sec. 1 of the Revenue Act of 1939, c. 247, 53 Stat. 862] CAPITAL STOCK (AND SIMILAR INTERESTS).

(a) *Original Issue*.—On each original issue, whether on organization or reorganization, of shares or certificates of stock, or of profits, or of interest in property or accumulations, by any corporation, or by any investment trust or similar organization (or by any person on behalf of such investment trust or similar organization) holding or dealing in any of the instruments mentioned or described in this subsection or section 1801 (whether or not such investment trust or similar organization constitutes a corporation within the meaning of this title), on each \$100 of par or face value or fraction thereof of the certificates issued by such corporation or by such investment trust or similar organization (or of the shares where no certificates were issued), 10 cents until July 1, 1941, and 5 cents thereafter: *Provided*, That where such shares or certificates are issued without par or face value, the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, per share (corporate share, or investment trust or other organization share, as the case may be), unless the actual value is in excess of \$100 per share; in which case the tax shall be 10 cents until July 1, 1941, and 5 cents thereafter, on each \$100 of actual value or fraction thereof of such certificates (or of the shares where no certificates were issued), or unless the actual value is less than \$100 per share, in which case the tax shall be 2 cents until July 1, 1941, and 1 cent thereafter, on each \$20 of actual value, or fraction thereof, of such certificates (or of the

shares where no certificates were issued). The stamps representing the tax imposed by this subsection shall be attached to the stock books or corresponding records of the organization and not to the certificates issued.

(b) *Sales and Transfers.*—On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subsection (a), or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each \$100 of par or face value or fraction thereof of the certificates of such corporation or other organization (or of the shares where no certificates were issued) 4 cents until July 1, 1941, and 2 cents thereafter, and where such shares or certificates are without par or face value, the tax shall be 4 cents until July 1, 1941, and 2 cents thereafter, on the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share as the case may be): *Provided*, That in case the selling price, if any, is \$20 or more per share the above rate shall be 5 cents instead of 4 cents until July 1, 1941:

* * * *

(U.S.C. 1940 ed., Title 26, Sec. 1802)
SEC. 3772. SUITS FOR REFUND.

(a) *Limitations.*—

(1) *Claim.*—No suit or proceeding shall

be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof.

(2) *Time*.—No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of two years from the date of mailing by registered mail by the Commissioner to the taxpayer of a notice of the disallowance of the part of the claim to which such suit or proceeding relates.

* * * *

(U.S.C. 1940 ed., Title 26, Sec. 3772)